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Supreme Court of the United States

October Term, 1956

No. 439

BRIAN O. SPARKS, BRENT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSEN, FRANK T. HETORN, JOHN J. TAYLOR, *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES, *Intervenors*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMERICAN OVERSEAS AIRLINES AND AMERICAN AIRLINES IN OPPOSITION.

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TABLE OF CONTENTS.

	Page
Statement	1
Questions Presented	6
Reasons for Denying the Writ	7
I. The ruling of the court below that the Civil Aeronautics Board was not in error in submitting to the President a proposed order denying approval of an application for a transfer of a certificate in foreign air transportation was correct and in no event merits review by this Court	7
II. The petitioners' contention that the President acted beyond the scope of the proceeding in approving an order amending Pan American's certificate to include Paris and Rome is without merit	17
III. The petitioners' contention that the Board's order of July 10, 1950, was never adopted is without merit	21
IV. The petitioners' contention that the lower court "tossed them out of the case" without considering their arguments is patently groundless	22
V. The petitioners present a wholly academic issue in their contention that it was erroneous for the lower court to regard the acquisition of AOA's assets by Pan American, as distinguished from the transfer of the certificate, as subject to Presidential approval	23
Conclusion	25

CASES CITED.

	Page
Acquisition of Cordova Air Service by Alaska Airlines, 4 CAB 708 (1944)	14
American Airlines, Consolidation of Routes 7, 21 and 23, 6 CAB 279 (1945)	14
Boston Tow Boat Co. v. United States, 321 U. S. 632 (1944)	22
Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U. S. 103 (1948)	8, 12
Continental Air Lines, Inc., Texas Air Service, 4 CAB 478 (1943)	14
North Atlantic Route Case, 6 CAB 319 (1945)	2, 20
Northwest Airlines, et al., Chicago-Milwaukee-New York Service, 6 CAB 217 (1944)	14
Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F. 2d 777 (D. C. Cir. 1949)	19
L. Singer & Sons v. Union Pacific R. Co., 311 U. S. 295 (1940)	22
Union Drawn Steel Co. v. National Labor Relations Board, 109 F. 2d 587 (3d Cir. 1940)	22

LEGISLATIVE MATERIALS CITED.

	Page
83 Cong. Rec. 6636	10
H. R. Rep. 2254, 75th Cong.	9
H. R. Rep. 2635, 75th Cong.	9, 10
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong.	12
Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong.	10, 12
Hearings before Senate Committee on Commerce on S. 3760, 75th Cong.	9

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STATEMENT

In 1945 the Civil Aeronautics Board entered an order, approved by the President, granting seven-year certificates of convenience and necessity under the Civil Aeronautics Act, 49 U. S. C. 401 *et seq.*, to Pan American World Airways (hereinafter called Pan American), to American

Overseas Airlines (hereinafter called AOA), and to Trans World Airlines[1] (hereinafter called TWA) authorizing them to engage in air transportation between the United States and various trans-Atlantic points.[2] The certificates expire on July 4, 1952. It was recognized in the original decision that the uncertainty of the post-war period made it necessary that action be temporary and tentative. *North Atlantic Route Case*, 6 C. A. B. 319, 334 (1945).

The certificates provided for route type operations, with authority to transport passengers, cargo and mail. The services conducted have been conventional passenger services, heavily subsidized through mail payments, with incidental carriage of cargo. The AOA traffic to Europe moved, in major part, between the United States and London and Frankfurt. This was also true of Pan American, which duplicated AOA's route to those two cities, as well as serving other points in Europe and beyond. TWA served neither London nor Frankfurt, but was the sole American carrier offering service from the United States to Paris, Rome, and beyond.

Late in 1948 AOA and Pan American entered into an agreement to transfer AOA's certificate to Pan American and to sell all of AOA's assets to Pan American. This transaction was subject to government approval as provided in the Civil Aeronautics Act, Section 801 (49 U. S. C. 601) of which requires that transfers or amendments of certificates for foreign air transportation be subject to approval by the President and Section 408 (49 U. S. C. 488) of which requires that an acquisition by one air carrier of

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[1] Then known as Transcontinental & Western Airlines, a name used in many of the documents pertinent to the pending petition.

[2] A United States citizen can engage in air transportation only if so authorized in a *certificate* of convenience and necessity, unless granted an exemption from the Civil Aeronautics Act. A foreign citizen can engage in air transportation only between the United States and foreign points and only when authorized by a *permit* issued under the Act. See Sections 1, 401, 402 and 416 of the Act (49 U. S. C. 401, 481, 482 and 496).

the assets of another be subject to approval by the Civil Aeronautics Board.

Appropriate applications for approval of the transaction were filed, and the Board instituted a proceeding to consider the transfer of AOA to Pan American. A prehearing conference was called at which time Public Counsel (an attorney for the Board representing the public) set forth a statement of the issues in the case which, as accepted by the parties, recognized that the certificate changes incident to the transaction were "subject . . . to approval by the President." Report of Prehearing Conference, January 19, 1949, App. A, pp. 2, 5 (RB 6940, 6950, 6953).[1] Subsequently, on motion of Public Counsel and of TWA, an intervenor, the Board instituted a proceeding to determine what, if any, amendments to the certificated routes of Pan American and TWA should be made if the transfer of AOA's certificate were approved. Order Serial No. E-2512, March 1, 1949 (R 155). This certificate amendment proceeding was consolidated with the proceeding on the AOA transfer. In the meantime numerous parties, including other air lines, public bodies, labor unions, and the petitioners, were permitted to intervene. Hearing in the consolidated proceeding, styled the *North Atlantic Route Transfer Case*, was held in late spring, 1949, and lasted for about six weeks; the record of the hearing included more than 4100 pages of testimony (RB 1-4119) and 2700 pages of exhibits. (RB 4120-6831) In December, 1949, an examiner's report was issued, recommending approval of the AOA transfer. (RB 8775-8975) The matter was briefed and argued to the Board in the spring of 1950.

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[1] For convenience, this brief will employ the system of record citations suggested by petitioners, at page 6 of their Petition for Writ of Certiorari: P for petitioners' Petition for Judicial Review in the lower court; PR for petitioners' Petition for Rehearing in the lower court; A for Affidavits of H. J. Friendly, *et al.*; R for the portion of the record printed pursuant to stipulation; RB for the unprinted portion of the record before the Board. In addition, OR will designate unprinted portions of the record before the lower court.

On June 1, 1950, the Board transmitted to the President a proposed order, for his consideration, disapproving the transfer of AOA. This order was accompanied by four separate opinions from the five Board members. (RB 10585-10749)

Two members (Messrs. O'Connell and Adams), in a long opinion, argued that the transfer would give Pan American too great power and should be disapproved. (RB 10586-10665)

One member (Mr. Ryan), in an elaborate opinion, argued that the transfer would result in a saving of subsidy and a strengthening of U. S. flag international air transportation, and would not involve the competitive disadvantages feared by opponents of the transaction since TWA, "already the dominant carrier in the transatlantic service" (RB 10726), could be expected to maintain a competitive balance between itself and Pan American. He urged approval of the AOA transfer without other route changes. (RB 10677-10732)

A fourth member (Mr. Jones) submitted a separate opinion in which he disagreed with the charge that the transaction should be disapproved because it would lead to "monopoly", but stated that he believed it would be better to await the expiration of the seven-year certificates, in 1952, before taking action upon a proposal such as that presented by the applicants. (RB 10666-10669)

A fifth member (Mr. Lee) felt that the transfer should be approved with the condition that the TWA route should be amended to include London. (RB 10670-10676)

On July 10, 1950, the President wrote the Board (RB 10750; R 147) stating that he had concluded that the transfer should be approved, but with route adjustments in the case of the two remaining carriers so that they would compete with each other to London, Frankfurt (as long as required by the military occupation), Paris and Rome. [Since both carriers already served Shannon and Lisbon, these changes made Pan American and TWA competitive

to the six major European traffic centers which, in 1948, accounted for nearly 70% of the total American-flag trans-Atlantic air passengers. (A 48; R 69)] The President said, in part:

> "This adjustment should result in the fullest accomplishment of the broad national objectives which, especially at this critical time, should govern the development of United States air transportation and will provide for vigorous competitive growth by our air lines.
>
> "It is most important that this matter be disposed of in the present proceeding without further delay in order that the carriers concerned may immediately go forward with plans for their needed further development."

Accordingly a revised order was adopted by the Board, was submitted to the President with an opinion, and was approved by the President on July 11, 1950. Order Serial No. E-4410, July 10, 1950 (R 142-155).

TWA and the petitioners appealed this order to the United States Court of Appeals for the Second Circuit. They petitioned for a stay pending appeal. The matter was briefed and argued to the court on July 26, 1950. The argument consumed the greater part of a day. Participating were counsel for TWA, for the petitioners, for the government, for Pan American, and for AOA. Argument and briefs were directed not only to the question of a stay but also—indeed primarily—to the merits of the appeals.

On August 14 the court dismissed the appeals, with an opinion noting that action on the merits was appropriate since the matter had been so thoroughly presented. (R 93-102)

TWA immediately announced that it would not pursue the matter. The petitioners, instead of applying to this Court, filed with the lower court an elaborate petition for reconsideration (R 103-140), again fully arguing their contentions, but making no further effort to obtain a stay.

This was filed on August 29, 1950, and denied by the court on September 6, 1950. (R 141) The petitioners did not seek a stay from this Court, and the petition here was not filed until December 4, 1950, being served upon respondents December 13, 1950.

In the meantime the Civil Aeronautics Board adopted various employee protective conditions, as contemplated by the order approving the transfer, and the transfer was consummated on September 25-26, 1950. The assets of AOA were conveyed to Pan American, the purchase price was paid, those AOA employees who so desired were transferred to Pan American, and the necessary arrangements were made in foreign countries. In addition employee adjustments, consonant with the Board order, have been made by American Airlines, majority stockholder in AOA, with those of its employees who had been engaged in work for AOA. TWA is now operating to London and Frankfurt; Pan American is operating to Paris and Rome; and AOA was dissolved on November 9, 1950.[1]

The seven-year life of the original certificates is not affected by the order here in question. The certificates still expire in July, 1952.

QUESTIONS PRESENTED

1. Whether, under Section 801 of the Act, the President, who admittedly controls the ultimate decision upon an application for transfer of a foreign route certificate if the Civil Aeronautics Board recommends approval of the

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[1] These events, occurring since the decision below, are not reflected in the record. 95.24% of the AOA stock (61.9% of the stock was held by American Airlines) voted in favor of the AOA dissolution on November 6, 1950, no negative votes being cast. As of December 28, 1950, the holders of 99.51% of the AOA stock had claimed and been paid the initial liquidation distribution of $9 per share and 89.43% of the AOA stock had been submitted for cancellation and payment of the final liquidation distribution of 92.2¢ per share.

transfer, has no control if a majority of the Board does not favor such approval.

2. Whether approval of the proposed certificate transfer could be accompanied by authorization for TWA to serve London and Frankfurt, and Pan American to serve Paris and Rome, where a recognized issue in the administrative proceeding was reallocation of existing routes between Pan American and TWA in the event the transfer were approved, and London, Frankfurt, Paris and Rome, points on such routes, had been specifically proposed during the proceeding as points for such reallocation.

3. Whether an order of the Board is valid if it is agreed upon at a meeting of the Board and is, on the following day, initialled by each member of the Board and then is approved by the President.

4. Whether any judicial question is presented in connection with the transfer of the assets of AOA, as distinguished from the transfer of its certificate, where the petitioners have not challenged the transfer of assets if the certificate was properly transferred.

REASONS FOR DENYING THE WRIT

I.

THE RULING OF THE COURT BELOW THAT THE CIVIL AERONAUTICS BOARD WAS NOT IN ERROR IN SUBMITTING TO THE PRESIDENT A PROPOSED ORDER DENYING APPROVAL OF AN APPLICATION FOR A TRANSFER OF A CERTIFICATE IN FOREIGN AIR TRANSPORTATION WAS CORRECT AND IN NO EVENT MERITS REVIEW BY THIS COURT.

The first two sentences of section 801 of the Civil Aeronautics Act (49 U. S. C. 601) provide:

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between

> places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

The petitioners, by a close reading of the first sentence, urge that the only negative order subject to Presidential approval is the denial of the issuance of a certificate or a permit; that if the Board does not approve a transfer or amendment of a certificate or a permit the matter is not subject to Presidential approval. This view would materially restrict the Presidential power with respect to the route structure of our international and territorial air transport system. The President could act where a route is to be granted or is to be refused, *if* the application sought a new certificate, but the President would be powerless where the question is one of transferring or altering a route, or creating a route by certificate amendment, if the Civil Aeronautics Board first arrives at an adverse decision.

Regardless of the wording of the statute, the inherent power of the President in this important aspect of our national defense and foreign affairs could not thus be circumscribed. See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 109-110 (1948). In any event the "meticulously literal reading" of the statute necessary to sustain the petitioners' argument is unwarranted. As this Court held in the *Waterman* case, Section 801 confers upon the President "a positive and detailed control over the Board's decisions" in this field. The control is incomplete, indeed, if the President may require a denial of approval of a transfer or amendment, but may not require an approval!

Congress certainly thought it was conferring full power upon the President with respect to decisions on foreign and

territorial route certificates and permits. The critical language of the first sentence of Section 801 originally appeared in H. R. 9738, of the 75th Congress, drafted by an interdepartmental committee and introduced by the Chairman of the House Committee on Interstate and Foreign Commerce. The favorable report of that Committee on that bill described the sentence thus:

> "Section 801: The President of the United States:—This section provides that *any action* of the Authority *with respect to* a permit authorizing a foreign air carrier to operate to this country, or *a certificate* authorizing an American air carrier to operate in overseas or foreign air transportation or between places in the same Territory or possession, shall be subject to the approval of the President." H. R. Rep. 2254, 75th Cong., p. 11. (Emphasis supplied.)[1]

Identical language was used in a section-by-section analysis of S. 3760 (a version of the interdepartmental committee's bill) made by Mr. Clinton M. Hester, Assistant General Counsel of the Treasury Department, for the Senate Committee on Commerce. Hearings before Senate Committee on Commerce on S. 3760, 75th Cong., p. 10. Then the Conference Committee of the two Houses explained the first sentence of section 801 as follows:

> "This section provides that *the action of the Authority with respect to certificates and permits* authorizing overseas and foreign air transportation or air transportation within a territory or possession shall be subject to the approval of the President." H. R. Rep. 2635, 75th Cong., p. 76. (Emphasis supplied.)

Thus from first to last the consideration of the first sentence of section 801 reflected the view that power was being vested in the President with respect to *all action* of the

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[1] The term "Authority" as used throughout the legislative history of the Civil Aeronautics Act, refers to the agency now known as the Civil Aeronautics Board.

Board with respect to foreign and territorial route certificates—and not merely with respect to *some* action of the Board.

This evidence of Congressional intention takes added significance from the addition of the second sentence of section 801 in the course of the legislative history. Originally in H. R. 9738 the present second sentence of the section did not appear. The Senate author, Senator McCarran, during the hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659, for which Senator Truman had proposed as a substitute a version of the interdepartmental bill, noted the omission of any provision for the "submission of applications of this nature to the President for approval or disapproval." Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., p. 163. Later Senator McCarran introduced S. 3845 (the bill which was finally to be adopted in the Senate); this bill contained what is now the second sentence of Section 801, as well as the critical language of the first sentence. The Senator explained Section 801 on the floor of the Senate as providing

> "for Presidential approval or disapproval of certain action of the authority . . . and providing the manner in which such matters should be submitted to the President." 83 Cong. Rec. 6636.

The Conference Committee, in reporting agreement upon Section 801 as it was adopted, observes of the second sentence that it

> "requires that copies of all applications, and decisions of the Authority, in respect of such certificates and permits shall be transmitted to the President." H. R. Rep. 2635, *supra.*

Certainly the second sentence of the section requires that "all decisions" be submitted to the President before publication—a requirement that makes sense only if it was intended that "all decisions", and not merely some deci-

sions, should be subject to the Presidential power. And, since the submission to the President is required *prior* to any announcement of the Board's views, it is apparent that Congress intended that the Board should act in this realm merely as a Presidential adviser, and not, as the petitioners urge, as an adviser with respect to some forms of decision and as the determining agency with respect to other forms of decision respecting these route certificates and permits. Clearly Senator McCarran, who drafted the second sentence, regarded it as coextensive with the first sentence.

The petitioners seek to rationalize their narrow reading of the statute by saying that Presidential approval would be required only where the Board would propose to change the status quo. The petitioners suggest that only where there is to be such a change are there any diplomatic questions raised which would make it appropriate for Presidential intervention in the matter.

The argument is not valid. A decision denying a certificate is no more a change in the status quo than a decision denying an amendment or a transfer; yet admittedly a decision denying a certificate is subject to Presidential approval. Furthermore, diplomatic questions can arise just as readily in the case of denials of transfers or amendments as in the case of approvals of transfers or amendments. Suppose, for example, that a sister nation desired that the permit of one of its carriers be transferred to another of its carriers: a Board determination to refuse to approve the transfer might precipitate a diplomatic issue of the first magnitude. Again, in this dynamic field, changes in conditions might cause keen interest on the part of a sister nation in having some alteration in the status quo. Thus a foreign nation might want an amendment in a route certificate of one of our carriers, either to provide that nation with more and different service or to restrict such service; a Board decision refusing an amendment in such circumstances could very easily frustrate a diplomatic program being pursued by the President.

The weakness of the petitioners' rationalization of their reading of section 801 is made even more evident by their failure to note that the section reflects more than merely the President's role as the nation's agent in the conduct of its foreign affairs. At least equally, section 801 reflects *the President's role as Commander-in-Chief of our armed forces.* As this Court said in the *Waterman* opinion, 333 U. S. at 108:

> "That aerial navigation routes and bases should be prudently correlated with facilities and plans *for our own national defenses* and raise new problems in conduct of foreign relations, is a fact of common knowledge. Congressional hearings and debates extending over several sessions and departmental studies of many years show that the legislative and administrative processes have proceeded in full recognition of these facts." (Emphasis supplied.)

That section 801 does reflect the President's military, quite as much as his diplomatic, role is demonstrated by the fact that it deals with air transportation not only in foreign commerce but also to and within our territories and possessions, which involves no question of relationships with foreign governments but which vitally affects the national defense.[1]

Upon considering the national defense aspects of the matter, it is quite clear that the President would be as much concerned with decisions refusing to change the status quo as with those making such a change. It is just as likely, from that standpoint, that the President would desire a transfer of a certificate as that he would not want a

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[1] That Section 801 was motivated in large part by considerations of national defense is abundantly attested in the legislative history. See, *e.g.*, Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., p. 40 (Mr. Hester); pp. 147-148 (Mr. Hester; Congressman Wadsworth); Hearings before a subcommittee of Senate Committee on Interstate Commerce on S. 3659, 75th Cong., p. 5 (Senator Truman); p. 163 (Senator McCarran).

transfer. A transfer might bring the route into stronger hands, might fit more readily into mobilization plans, might offer the possibility of linking foreign bases in a manner more consonant with the nation's safety; to permit the Board to decide finally that the transfer is not to be permitted would leave a glaring gap in the Commander-in-Chief's power. In this very case one consequence of the transfer of AOA's certificate to Pan American is that for the first time a single U. S. flag carrier is authorized to operate throughout Germany; heretofore Germany had been arbitrarily divided between two carriers.[1] It is not difficult to imagine that conditions today might make most urgent a unified U. S. flag operation in Germany, whereas in 1945 (when the routes were originally certificated) the matter might have seemed of no importance. Congress never intended, by section 801, that the Board could prevent such a move, fraught as it is with military implications. Yet the petitioners would leave the President impotent not only where the Board's view was adverse to a transfer but even where the Board was evenly divided[2] and so could take no affirmative action.

A final demonstration of the invalidity of the petitioners' interpretation of section 801 is the utter artificiality of the distinction which it makes between decisions denying certificates and those denying amendments to certificates. A carrier can be extended to new points either by issuing to it a *new* certificate or by *amending* its existing certificate. Thus Paris could have been added to Pan American's route either by issuing it a new certificate authorizing a London-Paris-Frankfurt route or by amending its existing certificate to add Paris as an intermediate stop between London and Frankfurt. The only difference between the two forms of accomplishing the same

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[1] AOA had been authorized to operate in north Germany, Pan American in south Germany, with each certificated to Frankfurt.

[2] It is not unusual for only four Board members to participate in a case.

thing would be that, if a new certificate were issued, Pan American could serve Paris only on a flight which stopped at London—the route junction point—enroute; whereas if the action were by an amendment of the existing certificate Pan American could over-fly London (upon compliance with simple procedures) on a Paris service. Thus an amendment carries greater authority than a new certificate. Yet the petitioners' argument would mean that denial of an amendment would not be subject to the Presidential power—though denial of the lesser authority, a new certificate, would be! Certainly the Board, in its twelve years of administering the Act, has never endorsed any such construction of the Act.[1]

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[1] The Board submitted to the President for approval an order *denying* an application for amendment of American Airlines' certificate for its El Paso-Mexico City route so as to add San Antonio as an intermediate point. *Continental Air Lines, Inc., Texas Air Service*, 4 CAB 478 (1943). And in a proceeding involving American's certificate to serve Windsor, Canada, the Board said:

> "The proposal of American Airlines, Inc. for a consolidation of its routes Nos. 7, 21, and a part of No. 23 involves the amendment of a certificate which authorizes service to a Canadian point, and the grant *or denial* thereof falls within the provisions of section 801 of the Act and is subject to approval of the President of the United States. For this reason, the American proposal will be considered in a separate opinion." *Northwest Airlines, et al., Chicago-Milwaukee-New York Service*, 6 CAB 217, 218 (1944). (Emphasis supplied.)

Similar language appears in *American Airlines, Consolidation of Routes 7, 21 and 23*, 6 CAB 279, 280 (1945).

These cases refute the petitioners' argument that the practice of the Board prior to the present proceeding was not to refer to the President a decision denying transfer, amendment, etc. of certificates. The single instance cited by the petitioners, a minor case involving a small company in Alaska, *Acquisition of Cordova Air Service by Alaskan Airlines*, 4 CAB 708 (1944), is thus revealed as representing inadvertence, rather than "practice", a conclusion which is underscored by the fact that, insofar as can be determined from the Board's records, the decision in the *Cordova* case was never even transmitted to the President, despite the injunction of the second sentence of section 801.

The petitioners seek to escape the wholly formalistic nature of this distinction by suggesting that an amendment, as contemplated by the statute, is something substantively different from a new certificate; and that if a new service is to be authorized then, even though the Board couches the authority in the form of an amendment, it is really a new certificate. This suggestion would introduce a hopeless complication. When would an amendment be an amendment and when would it be a new certificate? The question would be fundamental, because upon the answer would depend the extent of Presidential power. If a city to be added to a carrier's route is only fifty miles from one of its existing cities, would that be an amendment? Yet fifty miles might cross an international border and present all the questions involved in adding a city five hundred miles away. Is the new city directly on the line of flight between cities already certificated? If so, perhaps it would be an amendment, whereas if it is off the line of flight, creating an angular pattern, perhaps it would involve a new certificate. But how many degrees of angle would determine Presidential power? Or is the distinction to be found in a determination of the question whether the carrier would have to add a new schedule in order to provide the new service? But this question often cannot be answered with certainty at a given time, and it can be differently answered from one month to the next. *The petitioners suggest no definition to distinguish an "amendment" from a new certificate,* but presumably it would have to be cast in the light of just such considerations as these. It is obvious that neither Board nor President nor the parties would be able to tell, in particular cases, who had the power to decide. Congress certainly could not have intended such a fuzzy allocation of jurisdiction where issues are as delicate as those presented in marking out our international air route structure.

It is not surprising, therefore, that neither the petitioners nor anyone else suggested at any time prior to final action

in this proceeding by the Board and the President that, whatever the Board's views on the proposed transfer might be, the ultimate decision would not be made by the President. From the time of the first prehearing conference, the agreement between AOA and Pan American, insofar as it provided for a certificate transfer, was regarded as subject to the President's approval under section 801. See statement of issues by Public Counsel at first and second prehearing conferences. Report of Prehearing Conference, January 19, 1949, App. A, pp. 2, 5 (RB 6940, 6950, 6953); Report of Second Prehearing Conference, March 25, 1949, p. 2 (RB 6974, 6976). And when the applicants moved to dispense with an Examiner's report, partially on the ground that under the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) no such report is necessary where the decision is to be made by the President [Petition for Certification to and an Initial Decision by the Board, May 13, 1949, p. 8 (RB 7500, 7508)], counsel for the petitioners, in opposing, did *not* suggest that Presidential action would not be required if the Board determined to disapprove the proposed transfer, although he *did* advert to certain limited and incidental issues which the Board would decide independently of the President. See Memorandum of Sparks, et al., in Opposition to Petition of Applicants to Dispense with Recommended Decision, June 20, 1949, p. 2 (RB 7651, 7653). And present counsel for petitioners, then counsel for Seaboard and Western Air Lines, an intervenor, concluded his brief to the Board with the prayer that "the Board should *recommend* that the proposed acquisition of AOA by Pan American be disapproved". (RB 9274, 9306) (Emphasis supplied.) It was never hinted by anyone that a decision disapproving a transfer would be any less subject to Presidential approval than a decision approving the transfer, though section 1006 (49 U. S. C. 646) of the Civil Aeronautics Act, which provides for judicial review of Board orders, states that "No objection to an order of the Board shall be considered by the court unless such

objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

II.

THE PETITIONERS' CONTENTION THAT THE PRESIDENT ACTED BEYOND THE SCOPE OF THE PROCEEDING IN APPROVING AN ORDER AMENDING PAN AMERICAN'S CERTIFICATE TO INCLUDE PARIS AND ROME IS WITHOUT MERIT.

As we have seen, upon the motion of Public Counsel and of TWA the Board included within the proceeding the question of what amendments to Pan American's and to TWA's routes should be made if the transfer of AOA were to be approved. This was done specifically for the purpose, said the Board, of giving to the Board and the President latitude "to impose any route changes that were reasonably required in the public interest as a condition to the approval" of the proposal. Order Serial No. E-2833, May 19, 1949, p. 5 (R 158, 161).[1] Lending special emphasis to the breadth of the resulting proceeding, the Board rejected a motion made by Pan American to limit the broadened proceeding to a consideration of route changes within Europe; the Board insisted

> "that the Board and the President should be free to consider any and all of the points on the certificates of the transatlantic carriers in deciding whether route changes are required as a condition of approval of the transfer agreement, and the extent of such changes." *Id.* at p. 7 (R 163).

In accordance with these orders, Pan American proposed a route pattern which involved the addition to its route of Paris and Rome, among other things (Exh. PA-200; RB

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[1] Order Serial No. E-2833, which was directed to various motions, in effect confirmed, clarified and amplified Order Serial No. E-2512, March 1, 1949 (R 155).

5371); TWA proposed a pattern which involved the addition to its route of London and Frankfurt, among other things (Exh. TWA-160; RB 4675); and Public Counsel proposed a route pattern which, in effect, would have transferred from Pan American to TWA all of Pan American's trans-Atlantic route beyond Austria, among other things (Exh. PC-1; RB 6129). Testimony, exhibits, and argument were devoted at length to all of these proposals. The amendments finally approved by the President were amply within the ambit of these extensive proposals.[1]

The petitioners construct their argument to the contrary from a review of the Board's action, sustained by the Court of Appeals of the District of Columbia Circuit, in refusing to consolidate with this proceeding an application of Seaboard and Western Air Lines for a new all-cargo trans-Atlantic certificate. This action has no such effect as that attributed to it by the petitioners.

Seaboard and Western had been operating a non-scheduled, or "tramp steamer", type of all-cargo service between the United States and Europe under an exemption from the Civil Aeronautics Act; it had no certificate of convenience and necessity. It had applied for a certificate authorizing it to conduct an all-cargo service on a "demand" basis, not over regular routes, to virtually the entire European area and to the Middle East, contending that it offered a new type of service different from that provided by the presently certificated passenger-cargo carriers. Upon its motion to consolidate the hearing and decision of its application with the *North Atlantic Route Transfer Case*, the Board, though permitting it to intervene, refused to consolidate on the grounds, *inter alia*, that the Seaboard and Western "application emphasizes that there are basic differences between the type of operation

[1] At one point during the hearing a witness devoted a considerable portion of a day to testimony bearing on the question whether Pan American's certificate should be amended to include Jerusalem! (RB 1904-1928A)

proposed therein and the operations of the scheduled air carriers" and that consolidation "would necessarily raise issues relating to the need for such additional service not now present in the case." Order Serial No. E-2617, March 24, 1949, pp. 2, 3 (RB 6935 *et seq.*).

The Court of Appeals, on the appeal of Seaboard and Western, sustained the Board. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board*, 181 F. 2d 777 (D. C. Cir. 1949). Correctly it pointed out that the *North Atlantic Route Transfer Case* involved only "reallocating, because of a merger, existing routes between existing carriers," in the event the AOA route transfer to Pan American were approved, and that it was not a new area proceeding involving "the whole problem of North Atlantic routes and carriers". *Id.* at 780. Obviously the Seaboard and Western proposal, involving an entirely new certificated service and an entirely different type of operation, had no relationship to the problem with which the Board was concerning itself in this proceeding. Questions such as adding Paris and Rome to the Pan American route were brought into the case as an incident to a revision of the competitive relationships which might be required if one of the three existing certificated trans-Atlantic carriers were to disappear; Seaboard and Western's proposal had nothing to do with the question whether there should be two or three conventional service carriers. Hence the Court of Appeals' decision had no such effect as that attributed to it by the petitioners.

The utter lack of merit in the petitioners' present view of the scope of the proceeding is made manifest by one of the objections to the Examiner's report which they urged in brief to the Board. The Examiner had failed to make any recommendations as to route changes other than the approval of the transfer of AOA to Pan American. Of this failure the petitioners complained to the Board in the following language:

"The Board has recognized from the outset of this proceeding that approval of this transaction might well upset the whole theory and pattern of the balanced competition that it established in the North Atlantic Route Case. It thus expressly broadened the issues in this proceeding to permit a consideration of what compensating advantage might be granted to Trans World Airline in the event that the Board were to approve the transaction. Evidence on this general question was introduced by the parties to the proceeding. . . .

"Two things are therefore clear. The first is that the state of this record, because of the Examiner's action, makes it impossible for the Board to consider changes in route structure in the North Atlantic that might be required in the public interest if the three carriers that now service Europe were reduced to two. To permit adequate consideration of that inherently difficult problem, this case should be remanded to the Examiner to make appropriate findings and recommendations upon which the Board then with the benefit of relevant argument could sit in judgment.

"Secondly, the approval of this transaction would in and of itself foreclose that adequate re-survey of the entire North Atlantic route pattern that the Board promised the public in the North Atlantic Route Case. The Examiner has treated this issue lightly, relying upon the temporary nature of Overseas' certificate . . . if a more equitable division of territory between Pan American and Trans World Airline were in 1952 to be the desirable answer, will it be easy simply by fiat to turn over territory then serviced by Pan American . . . to Trans World Airline? In short, the Examiner has placed the Board, *contrary to its express instructions*, in a difficult position. The Board is in no position to consider what changes should be made in the North Atlantic route pattern as a condition of the approval of this transaction." Brief of Sparks, *et al.*, to the CAB, pp. 15, 16. (RB 9108, 9124-9125) (Emphasis supplied.)

Thus the petitioners expressly recognized, to the Board, that it had broadened the proceeding in order

"to consider changes in route structure in the North Atlantic that might be required in the public interest

if the three carriers that now service Europe were reduced to two."

They expressly recognized, to the Board, that evidence was presented on this issue. They complained only that the Examiner had not presented recommendations for such changes.

Certainly they cannot complain now that the President did the very thing which the Board's order—as they themselves interpreted it—contemplated that he should be free to do, that is make route changes deemed requisite, as a result of reducing to two the certificated trans-Atlantic carriers, in order to maintain the proper competitive relationship.

III.

THE PETITIONERS' CONTENTION THAT THE BOARD'S ORDER OF JULY 10, 1950, WAS NEVER ADOPTED IS WITHOUT MERIT.

Even if petitioners state correctly the events of July 10 and July 11, 1950, the conclusion that the order in question is invalid does not follow. Admittedly, the Board met and determined in meeting the action it would take; admittedly, also, each member of the Board approved the order by initialling it in its final form before submission to the President. It would indeed be surprising to most administrative agencies to find that a Board, the members of which occupy contiguous offices, are in daily contact with each other in regulating a technical field, and who operate under procedures designed to promote expeditious handling of complex matters in that field, is bound by a procedural requirement that they must meet in the same room to initial a document the content of which was agreed upon at a formal meeting the day before! Judicial decisions which have looked askance at action taken informally by boards of directors, county supervisors, and zoning commissions which meet infrequently are completely irrelevant to this phase of the administrative process.

In any event the order was approved by the President; the internal process of the Board is beside the point.

IV.

THE PETITIONERS' CONTENTION THAT THE LOWER COURT "TOSSED THEM OUT OF THE CASE" WITHOUT CONSIDERING THEIR ARGUMENTS IS PATENTLY GROUNDLESS.

Because the lower court's opinion did not explicitly deal with two of the contentions made by the petitioners, they argue that the lower court treated them as having no appealable interest.

AOA and Pan American did contend that the petitioners had no appealable interest.[1] The court below specifically

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[1] Were there to be further proceedings in this case we would press our contention, made below, that the petitioners assert no appealable interest. See *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295, 303 (1940); *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, 634 and cases cited (1944); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 587, 592 (3d Cir. 1940). We opposed their intervention in the Civil Aeronautics Board proceeding. The grant of such intervention did not establish an appealable interest; the Board's rules provide that leave to intervene before it is not a determination that the intervenor has such an interest "as will entitle it to demand court review". CAB Procedural Regulations, sec. 302.6(b)(3). After the evidence was presented in the CAB hearing, we contended that it failed to sustain and even contradicted the sworn representations made to the CAB by the petitioners which were the basis for their intervention. See Brief to CAB Examiner on behalf of AOA, pp. 40-44 (RB 8246, 8290-8294). Moreover the petitioners' intervention papers in the CAB proceeding expressly left to the intervening labor unions the preservation of rights under collective agreements with AOA. Sparks, *et al*, Petition to Intervene, p. 3 (RB 7036, 7039). Likewise we contended in our memorandum to the lower court that the petitioners had not sufficiently proved that they are acting in a representative capacity or that they represent any stockholder interest (see affidavit of E. S. Travers, filed with the lower court on behalf of AOA and American Airlines in opposition to the petitioners' motion for stay, OR 113)—though it may be doubted that it is material whether the petitioners are acting for themselves alone or as representatives of others.

noted the extent of the pecuniary interest of the petitioners in its discussion of the motions for a stay pending appeal,[1] but proceeded to dispose of the appeals on fundamental grounds going to jurisdiction over the subject matter.

The court was composed of notably distinguished jurists. It is far fetched to suggest that, despite its clear references to the petitioners, they were denied a forum.[2] It is true that two of the several points made by the petitioners below, and repeated in their petition here, were not discussed in the opinion. But the petitioners elaborately briefed and argued them (Petitioners' Brief in Support of Petition to Stay, pp. 30-42, 45-47) and repeated them in full in a carefully prepared and printed petition for reconsideration. PR 7-19 (R 113-125) As we have observed, *supra* pp. 17-22, the two points in question have no merit. A court is not required to discuss in its opinion every point made by diligent counsel.

V.

THE PETITIONERS PRESENT A WHOLLY ACADEMIC ISSUE IN THEIR CONTENTION THAT IT WAS ERRONEOUS FOR THE LOWER COURT TO REGARD THE ACQUISITION OF AOA'S ASSETS BY PAN AMERICAN, AS DISTINGUISHED FROM THE TRANSFER OF THE CERTIFICATE, AS SUBJECT TO PRESIDENTIAL APPROVAL.

The petitioners urge error in the lower court's statement that, since the acquisition of AOA's assets by Pan American was "inextricably mingled" with the transfer of the

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[1] The court said of the petitioners, "Their only pecuniary interest in staying the consolidation is to prevent loss of their jobs or impairment of seniority rights." (R 98).

[2] An indication of the lower court's attentiveness to petitioners' arguments is the fact that the court addressed some 40 questions to counsel for petitioners during his 41 pages of argument, including questions directed to the argument that the route adjustments imposed were not within the scope of the proceeding (transcript of argument, pp. 45, 46, 49, 50); to the argument that the order of July 10, 1950, was not adopted by the Board (pp. 25, 53); and to the nature of petitioners' interest (p. 23).

certificate, the whole transaction was subject to the approval of the President. (R 100)

Obviously, if the AOA certificate were to be transferred, it would make no sense, on the facts of this case, were the assets not to be transferred. Hence it is difficult to see how there could be any view other than the view that the two matters were "inextricably mingled".[1]

But even if the petitioners are correct, and even if the transfer of assets, strictly speaking, was not subject to the President's approval, the issue is academic. The Board in fact made findings and approved the asset transfer independently; as the petitioners themselves recognize (Petition, p. 32), the Board treated the matter as though the President's power were limited to the question of the transfer of the certificate. Furthermore—and this disposes of the petitioners' point completely—the petitioners expressly took the position in the lower court that they were not questioning the correctness of the approval of the acquisition of assets, assuming the validity of the transfer of the certificate; in their petition for reconsideration below they specifically stated, at p. 28 (R 134), that they did not seek "to get review limited to that portion of the order" dealing with the assets acquisition, but that they referred to the assets acquisition question only to illustrate what they regard as "the unfortunate results" as a matter of policy

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[1] It is of at least passing interest that in point VIII of the petitioners' brief to the lower court in support of their petition for a stay, the petitioners protested that employee protective conditions had not been adopted in the order approved by the President. The petitioners argued that the whole matter should have been submitted to him, saying:

> "The President's approval power under Section 801 should be exercised with reference to the entire transaction placed before him for approval, and a partial disposition of a matter thus submitted to him is invalid."

Surely the transfer of assets was at least as "inextricably mingled" with the certificate transfer as were employee protective conditions.

that flow from treating a denial of a certificate transfer as subject to the President's power. They cannot complain here of the lower court's treatment of an aspect of the case with respect to which they disclaim interest.

CONCLUSION

A distinguished tribunal below gave full consideration to the case after extensive oral argument. The petitioners' contentions have no merit. Their appealable interest is at best doubtful. Their points, moreover, are of no general importance. There is involved no conflict among lower court decisions. There is every reason that this lengthily agitated matter should finally be at rest so that, as the President said, "at this critical time . . . the carriers concerned may immediately go forward with plans for their needed further development."

The petition should be denied.

Respectfully submitted,

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